Supreme Court, U.S.
FILED

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No. ___

IN THE

Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

CITY OF CHESTER,
COUNTY OF DELAWARE, AND
CONSOLIDATED RAIL CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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January 3, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

103pp

QUESTION PRESENTED

Whether the Pennsylvania Commonwealth Court is correct in rejecting the determinations of the courts of the Third Circuit that the exemption provided in Amtrak's enabling statute, 49 U.S.C. § 24301(l), which is based on the interstate commerce clause, exempts Amtrak and SEPTA from allocations assigned by the PUC pursuant to its statutory mandate to oversee the alteration, relocation, suspension or abolition of highway bridges over railroad rights-of-way in a manner which promotes public safety and prevents accidents?

LIST OF PARTIES

The parties to the Pennsylvania Commonwealth Court action are the City of Chester, the County of Delaware, the Consolidated Rail Corporation (the caption below has been changed to reflect the change from Consolidated Rail Corporation to Norfolk Southern Railway Corporation), and the Pennsylvania Department of Transportation. In addition, the National Railroad Passenger Corporation and the Southeastern Pennsylvania Transportation Authority have been served with a copy of this Petition.

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---

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Pennsylvania Public Utility Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Pennsylvania Supreme Court entered in the above-entitled proceeding on October 5, 2001.

OPINIONS BELOW

The order of the Pennsylvania Supreme Court denying the petition for allowance of appeal from the opinion of the Commonwealth Court of Pennsylvania are reprinted in the appendix hereto (App. A, p. 1a).

The opinion of the Commonwealth Court of Pennsylvania is reported at 773 A.2d 1280 (2001). It is reprinted in the appendix hereto (App. B, p. 2a).

The two opinions and orders of the Pennsylvania Public Utility Commission are reprinted in the appendix hereto (App. C, p. 15a and D, p. 39a).

JURISDICTION

On October 5, 2001, the Supreme Court of Pennsylvania denied the petition for allowance of appeal filed by the Pennsylvania Public Utility Commission, leaving intact the April 7, 2001 decision of the Commonwealth Court of Pennsylvania. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

STATUTES INVOLVED

The relevant provisions of 49 U.S.C. § 24301(*l*), 66 Pa. C.S. §§ 2702, and 2704 are reprinted at Appendix F, p. 69a).

STATEMENT OF THE CASE

The federal courts in the Third Circuit and the state courts of Pennsylvania have developed irreconcilable case law regarding the interpretation of a federal statute that exempts the National Railroad Passenger Corporation (Amtrak) and the Southeastern Pennsylvania Transportation Authority (SEPTA) from certain local taxation. In particular, the federal courts have ruled that this federal tax exemption statute exempts Amtrak and SEPTA from any state law obligation to pay a share of the costs associated with the repair and maintenance of rail-highway crossings in Pennsylvania. However, the Pennsylvania Commonwealth Court has ruled, unequivocally, that the language of the federal tax exemption statute does *not* apply to such allocated repair and maintenance costs.

In order to assure public safety at rail-highway crossings, the Pennsylvania Public Utility Commission (hereinafter "PUC" or "Commission") is obligated, under state law, to allocate, among affected parties, the legitimate costs incurred

to repair and maintain rail-highway crossings. However, the effect of this legal impasse between the federal and state courts is that the PUC is unable to carry out its uncontested duty to assure public safety at rail-highway crossings in Pennsylvania.

At this juncture, the Pennsylvania Supreme Court has let stand a Commonwealth Court order directing the PUC, for the third time, to issue an order directing that Amtrak and SEPTA be allocated their appropriate share of the rail-highway crossing repair and maintenance costs. In effect, the Commonwealth Court order directs the PUC to disregard the federal courts' interpretation of the federal tax exemption statute which directs the PUC to not allocate any share of these costs to Amtrak and SEPTA. Only review by the Honorable Court can resolve this irreconcilable conflict between the federal and state court systems on this issue.

Federal Tax Exemption Statute

The statute, which exempts Amtrak and SEPTA from a "tax, fee, head charge, or other charge, imposed or levied by a State, [or] political subdivision," 49 U.S.C. § 23401(l), has been interpreted by the courts of the Third Circuit to exempt Amtrak from Commission allocations of costs and responsibilities for work and maintenance performed on highway bridges over railroad rights-of-way to ensure the safety of the crossing areas. 66 Pa. C.S. §§ 2702, Appendix F.

The Commonwealth Court rejected the federal courts' application of the tax exemption statute and, in the order under review, directed the Commission to not apply the exemption. 773 A.2d 1280, 1285.

Although the Commonwealth Court has retained jurisdiction in the matter, both Amtrak and SEPTA have filed for injunctive relief in the United States District Court for the Eastern District of Pennsylvania, seeking to order the PUC to act in contrary to a direct state court order. This conflict,

which is long-standing and cannot be resolved without the aid of this Court, is preventing the PUC from carrying out its own statutory mandate to prevent accidents and promote safety at rail-highway crossings in Pennsylvania.

The PUC is an independent administrative agency of the Commonwealth of Pennsylvania which operates in a quasi-judicial capacity and is charged with, among other things, the "prevention of accidents and the promotion of safety of the public" where railroad rights-of-way meet public highways within the boundaries of the Commonwealth. 66 Pa. C.S. § 2602(b). No construction, relocation, alteration, protection, suspension or abolition of a rail-highway crossing may occur without an order from the Commission, which may order necessary work to be performed and paid for by any public utility or municipal corporation concerned or by the Commonwealth. 66 Pa. C.S. §§ 2702(c), 2704(a).

State Administation Proceeding

The present case began with a PUC Order entered May 29, 1997 at PUC Docket No. M-00970921, which affirmed the action of the City of Chester in posting the Lloyd Street Bridge for a five (5) ton weight limit. A field conference held by Commission Staff revealed that no concerned party agreed to accept responsibility for maintaining the structure. Accordingly, by Order entered October 6, 1997, the Commission instituted an investigation to determine the condition, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above the grade of the track of the National Railroad Passenger Corporation (hereinafter "Amtrak") in the City of Chester, Delaware County, Pennsylvania. The October 6, 1997 Order also directed that the Pennsylvania Department of Transportation (PennDOT), the City of Chester (Chester), Delaware County (County), Amtrak, Southeastern Pennsylvania Transportation

Authority (SEPTA), Philadelphia Electric Company (PECO), Bell Atlantic-PA (Bell), Philadelphia Gas Works (PGW) and AT&T Communications be made parties to the proceeding.

Following a series of evidentiary hearings, briefs were filed by Commission Staff, Conrail, PennDOT, the City, and Amtrak. Reply Briefs were filed by Commission Staff, PennDOT, and Amtrak. The ALJ's Recommended Decision was issued on March 14, 2000, and Exceptions were filed by Amtrak, the City, PennDOT, Conrail, the County, and Reply Exceptions were filed by the City, Conrail, PennDOT, Commission Staff and the County. The issue before this Court, whether the Amtrak/SEPTA exemption prohibits the PUC from allocating costs and responsibilities in rail-highway crossing cases involving highway bridges over railroads, was properly raised, briefed and decided before the Commission.

Commission's September 1, 2000 Order

On September 1, 2000, the Commission issued its Opinion and Order in this matter, which denied all Exceptions and adopted the Recommended Decision of the ALJ. The Commission's Order of September 1, 2000, stated that Amtrak and SEPTA were exempted from the allocation of costs and responsibilities because of their federal exemption, in keeping with a line of federal case law. *National Railroad Passenger Corporation v. Pa. Publ. Util. Comm'n and Township of Tredyffrin,* 665 F.Supp. 402 (E.D. Pa. 1987), *aff'd.*, 848 F.2d 436 (3rd Cir. 1988), *cert. denied,* 109 S.Ct. 231 (1988) ("Therefore, we hold that Amtrak's immunity from local "taxes or other fees" in section 546b extends to assessments for local improvements of the kind at issue here." 848 F.2d at 440; *Southeastern Pennsylvania Transportation Auth. v. Pa. Pub. Util. Comm'n*, 826 F.Supp. 1506 (E.D. Pa. 1993), *aff'd w/o opinion*, 27 F.3d 558 (3rd Cir. 1994), *cert. denied*, 114 S.Ct. 318 (1994) (". . . there is no basis for concluding that SEPTA is entitled to a lesser immunity from

similar assessments [than Amtrak] in these cases, the PUC will be enjoined from allocating such costs against SEPTA . . ." 826 F.Supp. at 1526); *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, Civil Action No. 95-4500 (orders entered January 19, 1996 and August 23, 1999), 1999 U.S. Dist. LEXIS 12882. *See* Commission Order of September 1, 2000, Appendix D, page 39a.

Pennsylvania Commonwealth Court Decision

The Order was appealed to the Pennsylvania Commonwealth Court by the City of Chester, the County, and Conrail.[1] The three appeals were consolidated by Order dated November 16, 2000, and the Commonwealth Court was asked to review the question before this Honorable Court: whether the Commission's allocation of costs and responsibilities in rail-highway crossing cases where a highway bridge crossed the railroad, is prohibited by 29 U.S.C. § 24301(l), Appendix F, p. 69a.

The case was briefed by the City of Chester, Conrail, the County of Delaware, PennDOT and the PUC. Following oral argument, the Commonwealth Court of Pennsylvania issued an order on April 7, 2001, which vacated the order and remanded the matter to the PUC to hold an additional hearing and issue an adjudication to apportion costs for the repair and maintenance of the Bridge between the present parties, Amtrak and SEPTA within 120 days of the order. Although the Commonwealth Court retained jurisdiction, the Commission sought review by the Pennsylvania Supreme Court since the Commonwealth Court order directed the

[1] Although Amtrak and SEPTA were parties to the Commission case, they were not aggrieved by the order and did not appeal. Despite the fact that the question under appeal would be their federal tax exemption, neither party intervened before the Commonwealth Court.

Commission to violate a Consent Decree that the Commission had entered into with SEPTA in 1996, as well as the federal courts' interpretation of the Amtrak/SEPTA exemption.

On October 5, 2001, the Pennsylvania Supreme Court denied review without an opinion. Appendix A.

The Commonwealth Court opinion followed a line of Pennsylvania state court cases which holds that the federal exemption granted to both Amtrak and SEPTA is *not* applicable to allocations by the Commission in rail-highway crossing cases. *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. Ct. 1991), *petition for allowance of appeal* denied 531 Pa. 632, 611 A.2d 714 (1992) ("Accordingly, we find that SEPTA is not exempt under 45 U.S.C. § 581(c)(5) from the imposition of maintenance responsibilities for the substructure and superstructure of the Bridge." 592 A.2d at 804; *City of Philadelphia v. Pa. Publ. Util. Comm'n*, 676 A.2d 1298 (Pa. Cmwlth. Ct. 1996), *petition for allowance of appeal denied*, 564 Pa. 657, 684 A.2d 558 (1996), *cert. denied*, 520 U.S. 1144 (1997) ("Because the costs of repairing and maintaining the 41st Street Bridge are not a "tax" or "fee" from which Amtrak would be exempt, we vacate the PUC order and remand for it to make a new allocation of costs considering all parties, including Amtrak." 676 A.2d at 1309).

On September 1, 2001, the Commission issued its order on remand, wherein it complies with the Commonwealth Court directive and allocates certain costs for the maintenance of the Lloyd Street Bridge to Amtrak and SEPTA. The Commonwealth Court, under its retained jurisdiction, is reviewing the September 1, 2001, decision.[2]

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[2] Although the Commonwealth Court is reviewing the Commission's September 1, 2001 order, the issue of the Commission's ability to allocate costs to Amtrak and SEPTA has been decided finally. The law of the case

Additional Federal Court Proceedings

Amtrak, rather than seek relief from the Commonwealth Court, has filed a new complaint in the U.S. District Court for the Eastern District of Pennsylvania, basing its request for relief upon the Commission's September 1, 2001order which was itself issued pursuant to the direct order of the Commonwealth Court and which is the subject of this petition for writ of certiorari. *National Railroad Passenger Corporation v. Pa. Publ. Util. Comm'n, et al.*, C.A. No. 01-5570 (E.D. Pa.).

SEPTA has filed a petition to enforce the Consent Decree in the United States District Court for the Eastern District of Pennsylvania, also based on the Lloyd Street Bridge case, which is the subject of the present petition for writ of certiorari. *Southeastern Pennsylvania Transportation Authority v. Pa. Publ. Util. Comm'n*, C.A. No. 95-4500 (E.D. Pa.). Both cases were still pending at the time of this filing.

Since 1987, the Commission has been receiving conflicting orders from the state Commonwealth Court and the courts of the Third Circuit. The Commission's ability to issue and enforce orders aimed at preventing accidents and promoting safety at rail-highways crossing involving highway bridges in the Commonwealth is severely hampered by this continuing conflict. This Court could end this tortured line of conflicting case law by deciding one simple issue: whether the exemption from taxes and other fees provided to Amtrak in its enabling statute prohibits the PUC's allocations of costs and responsibilities in rail-highway crossing cases where a highway bridge crosses the railroad is prohibited.

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doctrine will not permit the Commonwealth Court to revisit its decision that the Commission must include the two parties in its cost allocation deliberations and that question would elude review in future decisions issued in this matter. *See City of Philadelphia v. Pa. Publ. Util. Com'n*, 720 A.2d 845 (Pa. Cmwlth. Ct. 1998), *petition for allowance of appeal denied*, 560 Pa. 869, 742 A.2d 677 (1999) for a discussion of the law of the case doctrine.

REASONS FOR GRANTING THE WRIT

I. THE PENNSYLVANIA COMMONWEALTH COURT HAS DECIDED A FEDERAL QUESTION CONTRARY TO THE HOLDINGS OF THE COURTS OF THE THIRD CIRCUIT

This case presents a question of substance not heretofore determined by the Supreme Court. The fact that the state and federal courts are entrenched in opposing viewpoints regarding the applicability of the Amtrak/SEPTA exemption severely hampers the ability of the PUC to carry out its statutory mandate to promote safety and prevent accidents at rail-highway crossings. The Commonwealth Court opinion is in direct conflict with the decisions issued by the federal courts of the Third Circuit. The Commonwealth Court has three times issued opinions which conflict with federal case law regarding whether or not the Commission can allocate costs and responsibilities in cases involving highway bridges over railroad rights-of-way to Amtrak and to SEPTA.

The Commission is prevented from assessing any costs or responsibilities to SEPTA under a Consent Decree entered in the U.S. District Court for the Eastern District of Pennsylvania, which is a final order that precedes the state action before this Court and which is entitled to deference under the doctrine of Full Faith and Credit. However, the Commission is required by Commonwealth Court order to disregard the Consent Decree and to consider SEPTA to be a party capable of bearing such costs and responsibilities.

The Commission is prohibited by federal case law developed under the Amtrak statute from allocating costs and responsibilities against Amtrak. However, recent Commonwealth Court decisions, including the opinion under review, require the Commission to include Amtrak in the pool of concerned parties to whom costs and responsibilities may be allocated. A Commission decision following one court system will be in conflict with the other. The Commission is,

however, bound to carry out its statutory mandate which requires it to assign maintenance responsibilities and resultant costs to some party in order to protect the public from a badly deteriorating highway bridge over a railroad, and must, therefore, continue to make decisions regarding rail-highway crossing safety. As explained by the Commonwealth Court:

> The allocation of costs of maintaining a highway-roadway crossing by the PUC is simply a determination of how those who benefit from the crossing will incur costs they would have had at common law and is not a tax or fee. . . .
>
> * * *
>
> . . . the allocation was intended to be a timely, fair method of ensuring the safety of the public by those responsible for the crossing. . . .
>
> * * *
>
> Without the PUC's intervention providing a reliable, orderly process, the public would have to rely on the railroad companies' voluntary fulfillment of its common law duty to maintain the bridges necessitated by their railroad tracks, with the only enforcement through the courts.

City of Philadelphia v. Pa. Publ. Util. Comm'n, 676 A.2d 1298, 1306-1308 (Pa. Cmwlth. Ct. 1996), *petition for allowance of appeal denied* 564 Pa. 657, 684 A.2d 558 (1996) *cert. denied* 520 U.S. 1144 (1997).

In addition, the Commission is facing possible injunctions and penalties from the federal court for complying with the state court order. The Commission must choose between issuing orders to ensure the safety at rail-highway crossings in the Commonwealth which violate either state or federal law, or failing to carry out its statutory mandate by issuing no orders at all. This situation will not resolve itself without a definitive review from this Honorable Court.

II. THE CONFLICT BETWEEN THE STATE AND FEDERAL COURTS HAS RESTRICTED THE COMMISSION'S ABILITY TO ISSUE AND ENFORCE ITS ORDERS

The PUC has been operating under the strictures imposed by the federal courts since 1988, when the first Amtrak case was decided by the District Court for the Eastern District of Pennsylvania. *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania, Public Utility Commission, et al.*, 665 F.Supp. 402 (E.D. Pa.1988) *aff'd.*, 848 F.2d 436 (3rd Cir. 1988), *cert. denied,* 488 U.S. 893 (1988). In that case, the courts held that the PUC's exercise of jurisdiction over Amtrak under 66 Pa. C.S. §§ 2702 to allocate costs and responsibilities involved in removal of a highway bridge over Amtrak-owned tracks and replacing the structure was preempted by 45 U.S.C. § 546(b).[3] The statute read:

> Amtrak or a rail carrier subsidiary of Amtrak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 1, 1981 . . . .

Under the federal court's interpretation of this tax exemption statute, the PUC may determine that Amtrak is a "concerned"

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[3] 45 U.S.C. § 546(b) was repealed by § 7(b) of the Act of July 5, 1994, Pub.L. 103-272, 108 Stat. 1379, and reenacted with linguistic but not substantive change and recodified at 49 U.S.C. § 24301(l) by §1(e) of the same Act, 108 Stat. 904. *See* H.R. Rep. No. 180, 103d Cong., 2d Sess. 1, 3, 5 (1993); amended again in 1997 to read: Amtrak, a rail carrier subsidiary of Amtrak, and any passenger or other customer of Amtrak or such subsidiary, are exempt from a tax, fee, head charge, or other charge, imposed or levied by a State, political subdivision, or local taxing authority on Amtrak, a rail carrier subsidiary of Amtrak, or on persons traveling in intercity rail passenger transportation or on mail or express transportation provided by Amtrak or such a subsidiary, or on the carriage of such persons, mail, or express, or on the sale of any such transportation, or on the gross receipts derived therefrom after September 30, 1981. . . . As amended Publ.L. 105-134, Title I, §§106(b), Title II, § 208, Title IV, §§ 401(1), (2), 402, 415(d)(1), 111 Stat. 2573, 2574, 2585, 2585.

party, but the PUC may not allocate any costs or responsibilities for the repair of a highway bridge over Amtrak right-of-way to Amtrak because "Amtrak's immunity from local "taxes or other fees" in section 546b extends to assessments for local improvements of the kind at issue here." 848 F.2d at 436.

In 1988, Congress extended the federal tax exemption in the Amtrak statute to those commuter authorities which acquired their properties from Conrail. SEPTA sought to obtain judicial affirmation of its interpretation of this section by appealing a case where the Commission had imposed maintenance responsibilities for the Woodland Avenue Bridge in Philadelphia, which carries a city street and SEPTA trolley tracks over and above SEPTA's electrified railroad tracks on its Media/Westchester commuter rail line. In *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. 1991), *alloc. denied,* 531 Pa. 632, 611 A.2d 714 (1992), Commonwealth Court affirmed the Commission's ability to impose costs and maintenance responsibilities on SEPTA, but remanded the proceeding to the Commission for the single purpose of considering the allocation of responsibility for maintaining the bituminous wearing surface between the surrounding the trolley tracks in light of another opinion which it issued at the same time. By Order entered June 21, 1995, the Commission modified its order of July 16, 1990 and directed that SEPTA maintain the bituminous wearing surface on the Woodland Avenue Bridge between the trolley tracks.

During the course of this litigation, SEPTA filed three complaints in the U.S. District Court for the Eastern District of Pennsylvania regarding four other Commission crossing cases in which the Commission had allocated maintenance responsibility to SEPTA. SEPTA filed simultaneous appeals with the Commonwealth Court in those cases, which stayed its cases pending the outcome of the federal court cases.

The District Court held that SEPTA was entitled to the same exemption from Commission cost allocations as Amtrak. *Southeastern Pennsylvania Transportation Auth. v. Pa. Publ. Util. Comm'n*, 826 F.Supp. 1506 (ED Pa.1993), *aff'd w/o opinion*, 27 F.3d 558 (3d Cir.), *cert. denied*, 115 S.Ct. 318 (1994). When the Commission issued its June 21, 1995 order in the Woodland Avenue remand, it imposed costs on SEPTA which were now prohibited by federal law. SEPTA filed a complaint in District Court regarding the matter.

The Commission, believing that the question of the tax exemption was settled, entered into a Consent Decree with SEPTA which was approved by the District Court on January 16, 1996 (a copy of Consent Decree is attached as Appendix F. The Consent Decree prevents the Commission from assessing costs or responsibility for "design, construction, reconstruction, inspection, maintenance, snow, ice, debris or graffiti removal, or repair for any highway bridge, exclusive of catenary or other railroad facility, over SEPTA's right-of-way to SEPTA" unless permitted by subsequent amendment to or appeal of applicable federal law. As a result, there is clear federal law prohibiting the PUC from allocating costs and responsibilities to SEPTA, and equally clear Commonwealth Court law which requires the PUC to do precisely that. A decision from this Honorable Court is necessary to give the PUC clear direction and to allow the PUC to carry out its statutory mandate to prevent accidents and to promote safety at rail-highway crossings in Pennsylvania.

The crux of the conflict is whether or not the PUC's allocation of costs of rail-highway improvement or repair projects, as well as the allocation of responsibility for future maintenance of the crossings, is a "tax or fee" within the meaning of the federal statute. The federal courts have said uniformly that it is, and the Commonwealth Court has said

that it is not, three times directing the PUC to include Amtrak in its allocation of costs and responsibilities and Amtrak crossings.

The Commission cannot comply with both the direction of the Pennsylvania Commonwealth Court and the courts of the Third Circuit. In order to allow the Commission to carry out its responsibilities, it is crucial that this Honorable Court resolve this conflict between the Third Circuit and the Commonwealth Court.

CONCLUSION

This Honorable Court has not yet decided the issue of whether the exemption provided in Amtrak's enabling statute, based on the interstate commerce clause, exempts Amtrak and SEPTA from allocations issued by the PUC, in connection with its statutory mandate to oversee the alteration, relocation, suspension or abolition of highway bridges over railroad rights-of-way in a manner which promotes public safety and prevents accidents. The Federal courts have prohibited the PUC from enforcing any order which assesses such costs and responsibilities, and the Commonwealth Court has remanded the present matter to the Commission, requiring the Commission to treat SEPTA and Amtrak as the Commission treats any concerned party within the meaning of the statute.

This virtual stalemate, where any order that the Commission issues in a case involving SEPTA or Amtrak is guaranteed to be either vacated by the Commonwealth Court or enjoined by the federal courts, creates a situation which endangers the welfare of the users of rail-highway crossings in Pennsylvania. It is vital that this Honorable Court review this issue to provide guidance to the PUC, the Commonwealth Court, and the courts of the Third Circuit.

WHEREFORE, the Pennsylvania Public Utility Commission respectfully requests that this Honorable Court grant the petition for writ of certiorari in this matter.

Respectfully submitted,

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